Hj Saari bin Sungib v Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–230–06 OF 2013
ABDUL AZIZ ABDUL RAHIM, DAVID WONG AND VARGHESE GEORGE JJCA
2 MARCH 2016

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Tort — Defamation — Qualified privilege — State Assemblyman ('appellant') in interview with newspaper reporter called for investigation into management of zakat funds in Selangor — Appellant claimed he had reliable information zakat funds were not properly managed — Whether appellant's statement made on occasion of qualified privilege — Whether as people's elected representative appellant had duty to voice out issues concerned electorate — Whether no evidence appellant made remarks with malice — Whether ordinary natural meaning of appellant's statements were not defamatory of respondents — Whether first respondent no locus standi to sue while second respondent never mentioned in any of appellant's statements

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The appellant, who was at the material time a member of the Selangor State Legislative Assembly ('the SSLA'), had, during the sitting of the SSLA, called for an investigation into the management of *zakat* funds in Selangor. He alleged he had information that millions of ringgit of *zakat* monies kept in fixed deposit had been transferred to a Takaful investment account and questioned the propriety of such a move. The appellant repeated his remarks outside the SSLA building to a newspaper reporter which resulted in an article appearing in a newspaper the following day stating that the appellant wanted the Lembaga Zakat Selangor to be investigated over the allegations he had made. Contending that his remarks had defamed them, the respondents successfully sued the appellant for defamation in the High Court and were awarded, inter alia, RM200,000 in general damages, RM100,000 in aggravated damages and an injunction restraining the appellant and his agents or servants from making any further statements defamatory of the respondents. The first respondent was apparently incorporated under the Trustees (Incorporation) Act 1952 on the strength of a trust deed. The second respondent was a statutory body established under s 4(1) of the Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003. The trial court held that the appellant's remarks defamed the respondents as a reasonable man could have easily understood them to mean that the respondents had done wrong in not distributing millions of ringgit of *zakat* monies to groups ('asnaf') who deserved them. The court also held that the appellant failed on his defences of fair comment and qualified privilege because he did not produce any evidence to either show his allegations were

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true or that his remarks were made on an occasion of privilege. The instant appeal was against the High Court's decision.

Held, allowing the appeal with costs of RM40,000:

(1) The first respondent had no locus standi to bring the instant action. Because the trust deed that incorporated the trustees and the certificate of incorporation were never tendered in evidence, the court was uncertain whether the corporate name of the trustees upon their incorporation was Lembaga Zakat Selangor or Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar as the first respondent was described here. This was an important point because under the Trustees (Incorporation) Act 1952, it was the corporate body that had the power and right to sue and be sued (see paras 18 & 36(a)).

(2) The second respondent was never referred to at all in the statements attributed to the appellant to provide any basis for it to claim that it had been defamed (see para 36(b)).

(3) In any event, the statements attributed to the appellant were not in their ordinary and natural meaning defamatory of the respondent; they only sought further investigation into a matter of administration of public funds and therefore were of public interest. Nothing in the impugned statements gave the impression that the putting of millions of ringgit of *zakat* monies in the Takaful Structured Invest account was unlawful or unauthorised and the appellant had never said so. The second respondent as a public body and the first respondent, as the public officers of Lembaga Zakat Selangor, responsible for the proper management of *zakat* monies, could not hide behind the allegation of defamation when someone called for investigation to be conducted on their affairs. *Zakat* collected was a public fund and the public had a right to know that they were properly utilised for the designated purpose (see paras 24, 26, 29 & 36(c)).

(4) The statements attributed to the appellant were uttered on an occasion of qualified privilege and there was no evidence of malice to defeat the same. As the people's elected representative, the appellant had the right to raise in the State Legislative Assembly matters which concerned the electorate particularly where it involved the discharge of public duty or function by a public body under a governing law or statute. If the appellant had information, as he claimed, to suspect that the management of *zakat* monies was not done in accordance with the law, he had a legal duty to bring it to the attention of the State Legislative Assembly to have the matter investigated. The respondents failed to show the appellant had a dominant motive to defame or ridicule them or that in making the statements the appellant did not believe what he had said (see paras 34–35 & 36(d)).

[Bahasa Malaysia summary

Perayu, pada masa matan ahli Dewan Undangan Negeri Selangor, ('DUNS'), telah, semasa persidangan DUNS, memanggil untuk siasatan pengurusan wang zakat di Selangor. Dia mengatakan dia mempunyai maklumat bahawa berjuta ringgit wang zakat yang disimpan dalam deposit tetap telah dipindahkan kepada akaun pelaburan Takaful dan mempersoalkan kesesuaian langkah tersebut. Perayu telah mengulangi kenyataannya di luar bangunan DUNS kepada wartawan surat khabar yang menghasilkan dalam satu artikel yang terdapat dalam surat khabar hari berikutnya yang menyatakan bahawa perayu ingin Lembaga Zakat Selangor disiasat atas dakwaan yang telah dibuat olehnya. Dengan mengatakan kenyataannya telah memfitnah mereka, responden-responden telah berjaya menyaman perayu untuk fitnah di Mahkamah Tinggi dan diawardkan, antara lain, RM200,000 dalam ganti rugi am, RM100,000 dalam ganti rugi tambahan dan satu injunksi menghalang perayu dan ejen-ejen atau pekerja-pekerjanya daripada membuat apa-apa kenyataan berunsur fitnah selanjutnya tentang responden-responden. Responden pertama sebenarnya telah diperbadankan di bawah Akta (Pemerbadanan) Pemegang Amanah 1952 atas kekuatan surat ikatan amanah. Responden kedua adalah badan berkanun yang ditubuhkan di bawah s 4(1) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003. Mahkamah perbicaraan memutuskan bahawa kenyataan perayu telah memfitnah responden-responden kerana seorang yang munasabah dengan mudah akan memahami ia bermaksud bahawa responden-responden telah melakukan kesalahan kerana tidak mengagihkan berjuta ringgit zakat kepada golongan asnaf yang layak menerimanya. Mahkamah juga memutuskan bahawa perayu telah gagal dalam pembelaannya untuk komen adil dan perlindungan bersyarat kerana dia tidak mengemukakan apa-apa keterangan sama ada untuk menunjukkan dakwaannya adalah benar atau bahawa kenyataannya telah dibuat atas perlindungan. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM40,000:

(1) Responden pertama tiada locus standi untuk memulakan tindakan ini. Oleh kerana surat ikatan amanah yang memperbadankan pemegang-pemegang amanah dan sijil pemerbadanan tidak pernah ditenderkan sebagai keterangan, mahkamah tidak pasti sama ada nama korporat pemegang-pemegang amanah selepas pemerbadanan mereka adalah Lembaga Zakat Selangor atau Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar sebagai responden pertama digambarkan di sini. Ini adalah perkara penting kerana di bawah Akta (Pemerbadanan) Pemegang Amanah 1952, ia adalah badan korporat yang mempunyai kuasa dan hak untuk menyaman dan disaman (lihat perenggan 18 & 36(a)).

(2) Responden kedua tidak pernah dirujukan langsung dalam kenyataan yang berpunca daripada perayu untuk memberikan apa-apa asas untuknya mendakwa bahawa ia telah difitnah (lihat perenggan 36(b)).

(3) Dalam apa keadaan, kenyataan yang berpunca daripada perayu bukan dalam maksud biasa dan semula jadi yang berunsur fitnah tentang responden, mereka hanya memohon siasatan selanjutnya ke dalam perkara berhubung pentadbiran wang awam dan oleh itu adalah kepentingan awam. Tiada apa dalam kenyataan yang dipersoalkan memberikan tanggapan bahawa peletakan berjuta ringgi wang zakat dalam akaun Pelaburan Berstruktur Takaful dalah tidak sah atau tidak diberi kuasa dan perayu tidak mengarahkan begitu. Responden kedua sebagai badan awam dan responden pertama, sebagai penjawat awam Lembaga Zakat Selangor, yang bertanggungjawab terhadap pengurusan wajar wang zakat tersebut, tidak boleh berselindung di sebalik dakwaan fitnah apabila seseorang memanggil untuk siasatan dilaksanakan berhubung urusan mereka. Zakat yang dikutip adalah wang awam dan orang awam mempunyai hak untuk mengetahui bahawa wang tersebut digunakan sewajarnya bagi tujuan yang tertentu (lihat perenggan 24, 26, 29 & 36(c)).

(4) Kenyataan yang berpunca daripada perayu telah diungkapkan dalam keadaan perlindungan bersyarat dan tiada keterangan niat jahat untuk mengalahkan yang sama. Sebagai wakil yang dipilih oleh orang ramai, perayu mempunyai hak untuk menimbulkan dalam Badan Perundangan Negeri perkara-perkara yang berkenaan para pengundi khususnya apabila ia melibatkan pelaksanaan tugas awam atau fungsi oleh badan awam di bawah undang-undang atau statut yang mengawal. Jika perayu mempunyai maklumat, sepertimana yang didakwanya, untuk mensyaki bahawa pengurusan wang zakat tidak dilaksanakan menurut undang-undang, dia mempunyai kewajipan perundangan untuk membawanya kepada perhatian Badan Perundangan Negeri agar perkara tersebut disiasat. Responden-responden telah gagal menunjukkan perayu mempunyai motif dominan untuk memfitnah atau memalukan mereka atau bahawa dengan membuat kenyataan tersebut perayu tidak mempercayai apa yang dikatakan olehnya (lihat perenggn 34–35 & 36(d)).]

Notes

For cases on qualified privilege, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 844–875.

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1965] 1 MLJ 142b (refd)
Abu Samah bin Omar v Zainal bin Montel [2004] 5 MLJ 377, HC (refd)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (folld)

Buchanan v Jennings [2005] 1 AC 115, PC (refd)
Dato Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608, HC (refd)
Dato' Musa Hitam v SH Alattas & Ors [1991] 2 CLJ (Rep) 487, HC (refd)
Horrocks v Lowe [1975] AC 135, HL (refd)
Institute of Commercial Management, United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408, HC (refd)
Ismail bin Shamsudin v Abdul Aziz bin Abdan and others suits [2007] 3 MLJ 512, HC (refd)
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 2 SLR 310, CA (folld)
Joshua Benjamin Jeyaretnam v Goh Chok Thong [1989] 3 MLJ 1, PC (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283; [2002] 7 CLJ 32, HC (refd)
Tan Sri Dato' Lim Guan Teik v Tan Kai Hee [2014] 9 MLJ 363, HC (refd)
Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun [2000] 4 MLJ 77, FC (folld)
Syed Husin Ali v Syarikat Percetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56 (refd)

Legislation referred to

Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ss 4(1), 7(2)
Evidence Act 1950 ss 57, 114
Federal Constitution arts 10, 72
Trustees (Incorporation) Act 1952 s 2(1), (3)

Appeal from: Civil Suit No 21–386 of 2009 (High Court, Kuala Lumpur)

Mohd Radzlan Jalaludin (Anwar Ezzad Zainal with him) (Hasshahari & Partners) for the appellant.
Hasnal Rezua (Mohd Ruzaini Zulkifli with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] This is an appeal by the appellant (defendant in the High Court) against the decision by the learned Suraya bt Othman J given on 14 May 2013 at High Court, Shah Alam allowing the respondents' (plaintiffs in the High Court) claim in libel against the appellant. In her decision the learned judge ordered the appellant to pay general damages in the sum of RM200,000 to the respondents. She also awarded the respondents RM100,000 as aggravated damages. All judgment sums were to carry interest at 8%pa from date of judgment until full realisation. In addition, the learned judge also ordered that an injunction be issued to the appellant, his agent or servant from continuing to publish or causing to be published any defamatory statements of the respondents. Costs of RM30,000 was awarded to the respondents as well.

[2] The appellant at the material time was an academician and a member of the State of Selangor Legislative Assembly for the Hulu Kelang constituency.

[3] The first respondent is a body corporate incorporated under the Trustees (Incorporation) Act 1952. The second respondent is a statutory body established under s 4(1) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('Enakmen'). The first respondent was incorporated by the second respondent pursuant to its powers under s 7(2) of the Enakmen by way of a trust deed dated 6 January 2006. The objective of the incorporation was to encourage, promote and administer the collection of *zakat* and *sedeqah* among the Muslim community in Selangor and to take steps and efforts for social and economic development of the said community.

[4] The respondents' defamation suit against the appellant was based on two statements purportedly made by the appellant. The first statement was allegedly made on 16 March 2009 outside the Selangor Legislative Assembly building to a reporter/journalist from *Akhbar Sinar Harian* by the name of Rosnani Saad who was said to have recorded the statement verbatim and had transcribed it. This statement is pleaded in para 5 of the respondents' statement of claim and is reproduced below:

> Pada 11 haribulan 12 saya dapat maklumat dari sumber-sumber yang amat dipercayai bahawa sumber tersebut ada gap antara duit masuk kutipan Lembaga Zakat dengan duit agihan. Gap itu agak besar, saya tidak dedahkan. Kalau boleh saya tidak mahu dedahkan amaun, dia ada percentage kutipan dan agihan. Dan dari segi maklumat dalamannya, apa yang berlaku adalah dalam Lembaga Pengarah, LZS tidak ada kuasa tentang agihan dan ia di bawah Lembaga MAIS. Dan kemudian pada 11 haribulan 12 saya terima makluman bahawa, duit yang beza itu yang tidak diagihkan itu diletak dalam deposit. Pada 11 hari-bulan 12 dipindahkan berjuta-juta ringgit kepada akaun yang skim takaful anjuran di bawah MAA Takaful menjelaskan nama program Takaful Link Structured Invest di bawah MAA Takaful. Itu satu usahalah, kerana dalam konteks hari ini, duit yang lebih selamat adalah duit deposit dalam kegawatan ekonomi. Lebih selamat dalam fixed deposit, akaunnya ada pulangan. Kalau invest, daripada dapat hinggalah ke kosong. Jadi itu risiko yang sangat besar dibuat oleh Lembaga Pengarah Majlis MAIS yang disaran perlu siasat. Tetapi apa yang menarik adalah pelaburan itu menjanjikan perlindungan takaful pada investor. Jadi kalau investor, adakah ia institusi, adakah ia Lembaga Zakat ataupun MAIS, ataupun Ahli Lembaga Majlis. Kalau ada Ahli Lembaga sendiri, maknanya itu merupakan satu perkara curigalah. Bagaimana dia menguruskan dana institusi yang dilaburkan dan bil itu dapat perlindungan peribadi ataupun apa-apa bentuk seperti yang saya cakap tadi. 11 haribulan 12 2008 masa itu kita ada beritahu pada Dato' Hassan Ali semalam, tetapi dia tidak tahu menahulah. Jadi saya berkesempatan beritahu perkara ini semalam ..., jadi nak siasat institusi saya ingat tidak ada masalah.

[5] The second statement was published as an article in *suratkhabar Sinar*

Harian on 17 March 2009. The statements in the article were purportedly extracts from the earlier statement made outside the Selangor Legislative Assembly hall and printed as an article in the said newspaper. The article was pleaded at para 6 of the respondents statement of claim. The article is re-produced below:

> Saari Sungib mendesak LZS disiasat berikutan pemindahan wang berjuta-juta ringgit yang tidak diagihkan ke satu akaun iaitu Takaful Structured Invest di bawah MAA Takaful, katanya ketika ditemui selepas sidang DUN ditangguhkan, semalam. Menurut beliau, sejumlah kutipan LZS yang sebelum ini disimpan dalam deposit tetap, dipindahkan kepada akaun Takaful Structured Invest.

[6] The respondent pleaded that in their ordinary meaning the two articles and statements means the following:

9.1 bahawa Plaintif-Plaintif telah bertindak secara menyalah-gunakan kuasa-kuasa mereka serta amanah yang diletakkan ke atas mereka di dalam pengurusan kutipan zakat umat Islam di Negeri Selangor;

9.2 bahawa Plaintif-Plaintif telah secara sulit dan secara tidak sah melaburkan wang kutipan Zakat di dalam satu institusi komersial dengan tujuan untuk mengaut keuntungan daripadanya;

9.3 bahawa Plaintif-Plaintif telah bertindak secara cuai dan/atau secara semberono di dalam mendedahkan wang kutipan zakat yang didakwa kononnya dilaburkan kepada risiko kerugian pelaburan berkenaan di dalam pasaran yang tidak menentu;

9.4 bahawa Plaintif-Plaintif telah melakukan pecah amanah dan keyakinan yang diletakkan ke atas mereka oleh umat Islam di Negeri Selangor;

9.5 bahawa Plaintif-Plaintif telah berlaku tidak jujur dan/atau bertindak secara korup di dalam kononnya melakukan pelaburan berkenaan secara sulit tanpa mendedahkan perkara tersebut kepada umat Islam di Negeri Selangor;

9.6 bahawa Plaintif-Plaintif telah tidak melaksanakan kewajipan mereka untuk mengagihkan keseluruhan dana zakat yang dikutip daripada umat Islam di Negeri Selangor kepada asnaf-asnaf yang berhak menerimanya;

9.7 bahawa Plaintif-Plaintif telah tidak mengagihkan keseluruhan dana zakat tersebut secara sengaja dengan tujuan untuk menggunakan jumlah yang tidak diagihkan bagi tujuan pelaburan dengan hasrat untuk mengaut keuntungan;

9.8 bahawa penggunaan dana zakat yang tidak diagihkan oleh Plaintif-Plaintif sebaliknya untuk tujuan pelaburan adalah bercanggah dengan hukum syarak dan/atau undang-undang Islam; dan

9.9. berdasarkan kepada perkara-perkara yang diplidkan di atas, Plaintif-Plaintif tidak layak untuk menjalankan kewajipan dan melaksanakan beban amanah yang ditempatkan di atas mereka.

AT THE HIGH COURT

[7] Further to the above, the respondents in their paras 28–33 of the statement of claim referred to a denial and demand for apology by the chairman of the second respondent issued on 17 March 2009 and published on 18 March 2009 by *Sinar Harapan*. It was further pleaded that the appellant had refused to withdraw the impugned statement and had gone ahead to claim that the appellant possessed 'maklumat lengkap' relating to the issue. This, the respondent said amounted to 'aggravating factors' for which aggravated damages ought to be awarded to the respondents.

[8] The respondent also submitted that the appellant never denied making the impugned statements and had caused the statements to be published.

[9] In his defense, the appellant raised defenses of fair comment and qualified privilege. The appellant never raised the defense of justification much less defense of absolute privilege under art 72 of the Federal Constitution but which defense was ventilated at the trial.

[10] For the appellant it was submitted that the subject matter of the impugned statements was raised for the first time during the sitting of the State Assembly with a motion to direct investigation into the investment. It was submitted the intention was to ensure that the management of the *zakat* fund in Selangor is done properly and systematically. The appellant also contended that the publication of the article by the *Sinar Harian* on 17 March 2009 and 19 March 2009 was done without his consent or knowledge.

FINDING BY THE LEARNED HIGH COURT JUDGE

[11] The learned judge held that, on the authorities of *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77 (FC) and *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310, the freedom of speech under art 10 of the Federal Constitution is not an absolute right to allow a person to recklessly malign others with impunity; and that a person has a right to protect his or her reputation.

[12] The learned judge was also correct to cite *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (which was followed in *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 and *Ismail bin Shamsudin v Abdul Aziz bin Abdan and others suits* [2007] 3 MLJ 512) as

authority in stating the law on the burden of proof in defamation cases.

[13] Guided by the above principles the learned High Court found: (i) the two statements were defamatory of the respondents because it could be easily understood by a reasonable man that the respondents had done a wrong act in not distributing the millions of ringgit of *zakat* monies to the deserving 'asnaf' (ie groups that are eligible to receive *zakat* money according to the teaching of Islam) in Selangor who are eligible to receive *zakat*; (ii) the appellant had not proven that the respondents did not distribute the *zakat* monies though the appellant had said in the second statement that he had *'maklumat lengkap'* on the issue; (iii) the appellant had only raised defence of fair comment and qualified privilege. However only in the course of the trial did the appellant raise the defence of absolute privilege under art 72 of the Federal Constitution; (iv) the appellant failed in his defence of fair comment and qualified privilege. The appellant had failed to produce any evidence to show that his accusation was true since the appellant claimed to have *'maklumat lengkap'* on the matter. As for the defence of qualified privilege the learned judge also found the appellant failed. There was no evidence produced during the trial to prove the existence of a 'privileged occasion' with respect to the first and second statements. On the defence of absolute privilege under art 72 of the Federal Constitution, the learned judge also found that it was not available to the appellant for statement made in the Legislative Assembly proceedings and which is repeated, as is the case here, outside the proceedings. On those findings the learned judge had allowed the respondents claim and awarded the respondent general and aggravated damages and costs as earlier stated.

OUR DECISION

[14] The first issue for determination was whether the impugned statements referred to the respondents. In *Institute of Commercial Management, United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, Lim Beng Choon J held that:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to ...

[15] Learned counsel for the appellant submitted that the two impugned statements in this case did not make any reference to the respondents. The name of the first and second respondent was never mentioned in the statements. The second respondent name was mentioned only in a newspaper report dated 18 March 2009 in a statement by the only witness of the respondents in this case. The statement by the second respondent was in

response to the two impugned statements and demanding an apology from the appellant and for the appellant to retract the statements that he had made during the sitting of the Legislative Assembly or face legal action. The statement by the second respondent as published by the newspaper *Sinar Harian* on 18 March 2009 reads:

> SHAH ALAM – Majlis Agama Islam Selangor (MAIS) menggesa Ahli Dewan Undangan Negeri (ADUN) Hulu Kelang, Saari Sungib supaya memohon maaf dan menarik balik kenyataan yang dibangkitkan dalam Sidang Dewan Undangan Negeri (DUN) kelmarin atau akan berhadapan dengan tindakan undang‐undang sekiranya gagal berbuat demikian.

[16] Therefore it was argued that the impugned statements did not refer to the respondents and that the learned judge was wrong to invoke the presumption under s 114 of the Evidence Act 1950 and also pursuant to s 57 of the same Act to base her finding that the two impugned statements did refer to the respondents. It was also submitted that the learned judge had erred in holding that the first and the second respondents are the same entity.

[17] In our view the appellant is correct to say that the first and the second respondents are two different entities. We think the learned judge had erred in treating them as one and the same entity. Learned counsel for the respondents conceded in his written submission that the proper entity who has the legal capacity to sue and be sued is the Lembaga Zakat Selangor not the first respondent. We agree with this submission. Section 2(1) of the Trustees (Incorporation) Act 1952 that trustees appointed under the section may apply to the Minister for a certificate of registration of the trustees as such body or association of persons as a body corporate. Section 2(3) of the same Act provides that upon such registration the trustees shall become a body corporate by the name described in the certificate of registration and shall have perpetual succession and a common seal and power to sue and be sued in such corporate name. Going by this argument we do not think that it is necessary to name the first respondent as a party to the action in this case. But it is pertinent to note that first respondent is the first plaintiff in the High Court. Being a body corporate the second respondent is capable of being defamed. We are unable to fully comprehend why the first respondent wanted to be a party to sue the appellant, unless they themselves felt that they were being defamed or ridiculed by the impugned two statements attributed to the appellant. It is here that we think the learned judge had erred. However the error is so fatal that it prejudiced the respondents' case. We are inclined to think that corporate name for the trustees in this case is Lembaga Zakat Selangor. This seems to be the position taken by the respondents' counsel. In his written submission he submitted that:

Lembaga Zakat Selangor is a religious trust foundation established for the purpose of collecting and distributing zakat. The 1st Respondent is the trustee of Lembaga Zakat Selangor.

The 1st Respondent and Lembaga Zakat Selangor indeed 'berfungsi secara bersama', as Lembaga Zakat can only operate through the 1st Respondent and the 1st Respondent is the body corporate responsible to execute the trust of Lembaga Zakat Selangor. The 1st Respondent and Lembaga Zakat Selangor are but one and the same.

[18] We agree with this submission. A body corporate can only operate and function through its human mind, which in this case the trustees themselves that have been appointed under s 2(1) of the Trustees (Incorporation) Act 1952. It appears that for Lembaga Zakat Selangor they are designated as Pengarah and collectively they are referred to as the Lembaga Pengarah. Probably this is provided in the trust deed that created the Lembaga Zakat Selangor. Unfortunately the trust deed was never put in evidence for the court to confirm this point. This perhaps explains why the first respondent is a party to this action. It will also be noticed that the individual trustee or Pengarah of the Lembaga Zakat Selangor was not named in the action. Because the trust deed that incorporated the trustees and the certificate of incorporation were never tendered in evidence we were uncertain whether the corporate name of the trustees upon their incorporation in this case is Lembaga Zakat Selangor or Lembaga Pemegang Amanah Lembaga Zakat Selangor (MAIS), Berdaftar as the first respondent was described here. We think this is quite an important point because under the Trustees (Incorporation) Act 1952 it is the corporate body that has the power and right to sue and be sued. This means that the first respondent has no locus to sue unless as we said earlier the individual trustees or Pengarah felt that they had been wronged by the impugned statements. If that is the case then each of them must be individually and personally named as the plaintiff. For the above reasons, we are of the view that the respondents case in so for far as the two impugned statements are concerned would only at its highest refer to the second respondent in its position as the oversight body of the Lembaga Zakat Selangor.

[19] Perhaps the two impugned statements in our view could have been read to refer to the Lembaga Zakat Selangor. The reason we say so is because the contents of the impugned statements were in relation to the administration of *zakat* collection and distribution and the Lembaga was the body incorporated for that purpose.

[20] The next issue is whether there had been publication of the impugned statements. The appellant did not deny that he had caused the publication of the impugned statements or their authenticity. However the appellant contends that the newspaper *Sinar Harian* did not obtain his permission to

publish the statements; therefore he is not liable. We do not think there is any merit in this argument by the appellant. In this regard we agree with the submission by learned counsel for the respondents that when the appellant made the impugned statements to the *Sinar Harian* reporter, he must have intended the natural consequences of his act ie that the statements would be published. The appellant cannot shift the burden to the media and claim that the media should have obtained his authorisation before publishing those impugned statements. It was submitted that there is no evidence that the appellant had informed the *Sinar Harian* reporter not to publish the impugned statements. Therefore we agree with the learned judge that there was publication of the impugned statements.

[21] The next question is whether the two impugned statements are defamatory of the respondents? We have said earlier in this judgment that we are doubtful whether the two impugned statements referred to the first respondent at all, though we are quite certain that they referred to the second respondent. However the learned judge found the impugned statements are defamatory of the respondents. Her reasons for saying so are as follows: Firstly, the learned judge was of the view that the appellant's accusation of the respondents' actions could be reasonably understood by a reasonable man that the respondents had done a wrongful act when the respondents failed to distribute millions of *zakat* fund to the eligible 'asnaf' and transferred millions of *zakat* fund to Takaful Structured Invest account. The learned judge based her finding on the following passage found in the impugned statement:

> Saari Sungib mendesak Lembaga Zakat Selangor (LZS) disiasat berikutan pemindahan wang berjuta-juta ringgit yang tidak diagihkan pada 11 Disember 2008 ke MAA Takaful. Menurut beliau, sejumlah kutipan LZS yang sebelum ini disimpan dalam deposit tetap, dipindahkan kepada akaun Takaful Structured Invest.

[22] The learned judge also held that the accusation was further reinforced by a statement by the appellant which was published in the second impugned statement which reads:

> Saari berkata, tidak timbul isu fitnah atau ingin menjatuhkan imej serta integriti pihak berkenaan sebaliknya beliau mempunyai maklumat lengkap berhubung isu tersebut.

[23] However the learned judge found that the appellant, having said that he had a complete information on the respondents alleged action, had failed during the trial to prove that the respondent had not distributed millions of *zakat* fund to the eligible 'asnaf' to support the allegation. Thus the learned judge concluded as follows:

> Selanjutnya, saya juga berpendirian bahawa defendan tidak dapat membuktikan bahawa plaintiff-plaintiff tidak mengagihkan wang zakat bernilai jutaan ringgit

kepada golongan yang sepatutnya kerana wang tersebut telah dipindahkan kepada akaun Takaful Structured Invest. Ini adalah kerana di dalam artikel kedua, defendan menyatakan bahawa beliau mempunyai bukti (maklumat lengkap) mengenai dakwaan tersebut. Namun ketika perbicaraan dijalankan beliau tidak dapat mengemukakan sebarang bukti yang jelas untuk menyokong dakwaan tersebut. Malahan plaintiff-plaintiff yang memberikan keterangan dan menjelaskan bahawa setelah audit dilakukan, tiada sebarang bukti yang menyokong tuduhan defendan tersebut. Oleh itu, saya menyimpulkan bahawa dakwaan defendan di dalam artikel pertama dan artikel kedua adalah palsu dan tidak benar. Maka, saya berpendapat bahawa artikel pertama dan artikel kedua tersebut mengandungi unsur-unsur fitnah selaras dengan prinsip-prinsip yang digariskan oleh kes-kes yang saya bincangkan di atas.

[24] We note that the two passages in the impugned statements, relied on by the learned judge to find that the statements were false and defamatory of the respondents, was calling for further investigation into the management of the *zakat* fund by Lembaga Zakat Selangor. Nothing in the two passages referred by the learned judge could in our view give the impression that the putting of millions of ringgit of *zakat* monies in the Takaful Structured Invest account was unlawful or unauthorised. The statements in our view simply raised the question why the *zakat* monies were not distributed instead of it was being put into an investment account. It has not been established by evidence that every single ringgit of *zakat* collected by Lembaga Zakat Selangor must be distributed. The evidence by the respondents themselves that there are undistributed *zakat* money being put in fixed deposits shows that not all *zakat* monies collected are distributed to the eligible 'asnaf'. The simple explanation for this could be that all the eligible 'asnaf' have been given their dues according to the Islamic principles of *zakat* distribution and after the distribution was done there is surplus of fund. The probability is that it is this surplus that is being kept in fixed deposits. We are looking at the issue in this manner after having considered the statement by the second respondent published on the 18 March 2009 in response to the impugned statements by the appellant and demanding an apology from the appellant. That statement is found in para 8 of the learned judge's judgment and it is reproduced below

8 Selepas itu, pada 18.3.2009 pihak plaintif-plaintif telah memberikan penjelasan dan menafikan kenyataan yang telah mengakibatkan penerbitan artikel tersebut. Satu artikel mengenai penjelasan dan penafian oleh plaintif-plaintif telah diterbitkan oleh akhbar Sinar Harian dan Utusan Malaysia yang masing-masing diterbitkan pada 18.3.2009. Artikel dalam Sinar Harian bertajuk 'ADUN Hulu Kelang digesa mohon maaf' dan artikel dalam Utusan Malaysia pula bertajuk 'MAIS mahu Saari Sungib mohon maaf buat kenyataan berbaur fitnah'. Kenyataan di dalam akhbar Sinar Harian berbunyi sedemikian:

Majlis Agama Islam Selangor (MAIS) menggesa Ahli Dewan Undangan Negeri

(ADUN) Hulu Kelang, Saari Sungib supaya memohon maaf dan menarik balik kenyataan yang dibangkitkan dalam sidang Dewan Undangan Negeri kelmarin atau akan berhadapan dengan tindakan undang-undang sekiranya gagal berbuat demikian. Dato' Setia Mohamad Adzib Mohd Isa berkata, kenyataan tersebut berbaur fitnah serta menjatuhkan imej dan integriti MAIS secara keseluruhannya yang dinaungi Sultan Selangor, Sultan Sharafuddin Idris Shah. MAIS menafikan sekeras-kerasnya tuduhan tidak bertanggungjawab yang dilemparkan beliau mengenai Lembaga Zakat Selangor dan perlu membuktikan ia berlaku. Ini disebabkan MAIS mahupun LZS tidak pernah memindah atau merancang untuk melakukan sedemikian terhadap wang zakat yang belum diagihkan. Wang zakat yang belum diagihkan itu disimpan di dalam akaun simpanan tetap sama ada di dalam Bank Islam mahupun di Bank Rakyat yang dijamin dari segi keselamatan dan patuh syariah. Wang zakat yang belum diagihkan perlu disimpan di bank melalui sistem Mudharabah sebelum ia disalur dan diagihkan kepada golongan yang berhak melalui program dan aktiviti yang dirancang. Malah sebarang pindahan zakat atau pindahan wang mahupun Baitulmal perlu mendapat kelulusan jawatankuasa yang berkaitan sama ada MAIS mahupun Lembaga Zakat Selangor.

[25] It is also obvious from the above statement that *zakat* monies that were collected are not immediately distributed. There would be *zakat* monies which are yet to be distributed or to use the expression in the above statement *'yang belum diagihkan'*. This money is also capable of being put in the fixed deposit or be invested pending their distribution. The management of this money would, in our view, be governed by the terms of the trust deed that appoints the trustees and established Lembaga Zakat Selangor.

[26] It is also to be noted that in the impugned statements the appellant never said that transfer of the *zakat* monies into the Takaful Structured Invest account is unlawful or unauthorised. All these must be determined by looking at the precise terms of the trust deed that established the Lembaga Zakat Selangor and the perimeters within which the trustees can do or cannot do any particular act. Unfortunately, as we have observed earlier, the trust deed was not in evidence. As such we will not be able to decide whether the trustees have or have not the power or authority to invest surplus of *zakat* monies or *zakat* collections that has yet to be distributed in an account such as the Takaful Structured Invest account. In this regard, we also notice that there is no unequivocal or categorical denial by the respondents that they did not or never transferred any *zakat* monies to Takaful Structured Invest account. There is also no denial by Takaful Structured Invest that the respondents never transferred any *zakat* money to them (for and as investment). In our view a statement from Takaful to that effect would have effectively demolished the appellant's case.

[27] In *Dato' Musa Hitam v SH Alattas & Ors* [1991] 2 CLJ (Rep) 487, it was said that 'the test as to whether the words complained of were defamatory or

not is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understood in a libelous sense. The test is objective and the question is what do the words mean as words and not what the defendant in his own mind meant by them or intended to mean'.

[28] There is no precise test applied to determine whether or not any given words are defamatory or are capable of a defamatory imputation. However if the impugned words or any imputation from the words have the tendency to lower the plaintiff in the estimation of right thinking members of society generally or to expose him to hatred, contempt or ridicule or discredit him or to injure his reputation in his office, it is defamatory – see *Abu Samah bin Omar v Zainal bin Montel* [2004] 5 MLJ 377, *Abdul Rahman Talib v Seenivasagam & Anor* [1965] 1 MLJ 142b, *Syed Husin Ali v Syarikat Percetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56.

[29] Guided by the above principles, (the same principles that were applied by the learned judge), we do not think that the words in the two passages relied on by the learned judge in their natural and ordinary meaning are capable of bearing a meaning defamatory of the respondents. The words in our view are expression of the appellant's concern with the administration of the *zakat* monies. In this respect we agree with submission by learned counsel for the appellant that the the second respondent as public body and the first respondent as the public officers of Lembaga Zakat Selangor responsible for the proper management of *zakat* monies cannot hide behind allegation of defamation when someone call for investigation to be conducted on their affairs. It is pertinent to note that the *zakat* collected is public fund and therefore the public has a right to know that they are properly utilised for the designated purpose.

[30] At this point it is appropriate for us to discuss the appellant's defences. Perusing the statement of defence by the appellant the defences raised by the appellants are (i) fair comment – see paras 3, 4, 5.3, 7, 8 and 9; (ii) qualified privilege – see para 16 of the statement of defence.

[31] As for the defence of fair comment, the law is that such statements made must be in the nature of comments of fact or event. If the statement contains facts and comments the appellant must show or particularise in his defence which of the statement are facts and which are comments. See *Tan Sri Dato' Lim Guan Teik v Tan Kai Hee* [2014] 9 MLJ 363 and *Dato Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608. For this defence to succeed the appellant must prove that the comments made are based on some fact and that the fact must be true – *Joshua Benjamin Jeyaretnam v Goh Chok Thong* [1989] 3 MLJ 1. In this regard we agree with learned counsel for the

respondents that this defence is not available to the appellant because the appellant had not shown in his statement of defence which part of the impugned statements are comments and which part are facts.

[32] With regard to the defence of privilege, the appellant is relying on absolute privilege. However learned counsel for the respondents submitted that the appellant never pleaded this defence; therefore it ought not to be considered because it is trite that parties are bound by their pleadings. However even if this defence is pleaded we are inclined to agree with the respondent that the appellant cannot avail himself to this defence. This is because the impugned statements that the appellant sought to be protected by this defence are statements made outside the Legislative Assembly. In *Buchanan v Jennings* [2005] 1 AC 115, the House of Lords held that the repetitions of statements made in the House of Parliament by an MP outside the house is not protected by absolute privilege.

[33] Does this mean that the appellant cannot rely on the defence of qualified privilege? It was said that qualified privilege is a right to an individual who stands in such relation to the circumstances that he is entitled to say or write that which would be libelous on the part of any one else – see *The Law of Defamation In Singapore and Malaysia* (2nd Ed) by Keith R Evans at p 62. In *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32 Ramly Ali J (now a Federal Court J) said that '[I]t is a question of law as to whether an occasion is privileged, as the plea is raised in defence. The question whether the occasion on which the statement was made was a privileged one is a question for the Judge and the defendant bears the burden of establishing the facts and circumstances necessary to create the privilege'.

[34] In our instant appeal, the appellant is the people's representative for Hulu Kelang constituency. He had raised the issue of distribution of *zakat* monies in the proceedings before the Legislative Assembly. He claimed that he had information that *zakat* monies collected were not distributed; instead the monies were put into fixed deposit and transferred to Takaful Structured Invest account. In our view as the people elected representative of his constituency the appellant has the right to raise the issue in the Assembly on matters which may concern or affect the electorate in his constituency particularly or the public generally. This would be particularly so where it involves the discharge of public duty or function by a public body under a governing law or statute. This is the check and balance in a democratic system of government to ensure that public money or assets are put to proper use for what they are meant under the law. The appellant repeated what he had said in the Assembly to a reporter outside the Assembly and his statement on the matter was reported and published by the newspaper. If the appellant in this case has information as he claimed to suspect that the management of the *zakat* monies is not done in

accordance to the law that governs such occasion he has a legal duty to bring it to the attention of the Assembly to have the matter be investigated. In the circumstance, we are of the view that he can avail himself to the defence of qualified privilege.

[35] Next question to ask is whether the defence of qualified privilege available to the appellant has been defeated by malice. In *Horrocks v Lowe* [1975] AC 135, Lord Diplock said at pp 149–150: 'the express malice means in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in accordance with a sense of duty or in bona fide protection of his own legitimate interests'. In this case the respondents as the plaintiffs has not shown that it was the appellant dominant motive to defame or ridicule the respondents. It was also not shown by evidence that the appellant in making the statement did not believe what he said. On the contrary the evidence shows that there are *zakat* monies yet to be distributed and had been put in a fixed deposit.

[36] In the result it was our finding based on a review of the evidence and submission of parties that:

(a) the first respondent had no locus standi to bring this action; the Lembaga Zakat Selangor perhaps was the proper party to institute the action;

(b) the second respondent was never referred to at all in the statements attributed to the appellant to provide any basis for the second respondent to claim that it had been defamed;

(c) in any event, the statements attributed to the appellant were not in their ordinary and natural meaning defamatory of the respondent; they were only seeking further investigations into a matter of administration of public funds and therefore of public interest;

(d) further, in any event, those statements attributed to the appellant were uttered on an occasion of qualified privilege and there was no evidence of malice to defeat the same

The above warranted appellate intervention.

[37] For the above reasons, we allowed the appeal with costs of RM40,000 here and below to the appellant, and the deposit is to be refunded.

Appeal allowed with costs of RM40,000.

Reported by Ashok Kumar